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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 208.

HERBERT H. WAXHAM, DOING BUSINESS AS WAXHAM HATCHERIES,

Petitioner,

vs.

SAMUEL B. SMITH AND THE BUCKEYE INCUBATOR COMPANY,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER.

It seems to us that most of our adversaries' brief tends to confuse, rather than to meet or elucidate, the issues.

To point out some of the things which are apt to mislead—not to re-argue our position—is the purpose of this memorandum.

I.

Findings of Fact.

Respondents argue upon the evidence—which is conflicting—as to the manner in which defendant's device operates,[1] on which the findings of the Master, concurred

[1] *e. g.*, pp. 25 to 36.

in by both of the lower Courts, are as we understand, not open to discussion in this Court. *Charleston Co.* vs. *U. S.*, 273 U. S. 220, 223. Our main brief is on the basis of such findings (*vid.* p. 10).

II.

Plaintiff's Erroneous Test of Infringement.

Much is said about the plaintiffs' *commercial* machines, and most of the argument about infringement[1] is taken up with a comparison of them with petitioner's machine and with machines made by Robbins and others and involved in other litigation. It is axiomatic in the law of patents that infringement cannot be made out by such comparison, for the patent is the only criterion.[2]

III.

Patentee Acquiesced in rejection of claim to invention now asserted by respondents.

Respondents' (plaintiffs') brief is based upon the thesis that Smith's invention was—

> "in the combination of setting eggs at short intervals in a chamber or cabinet so that eggs of various

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[1] Respondents' brief, pp. 25-36.

[2] The late Judge HOUGH, speaking for the Second Circuit Court of Appeals, said:

> "It is always a temptation to take a patentee's commercial article and argue that no advantage, shown by experience to reside therein, can be utilized by a competitor under pain of infringement. But legal infringement cannot be so proved; it is necessary to take the alleged infringing article, and show that the maker of that thing has appropriated what the claim substantially describes."
>
> *Harvey Hubbell, Inc.* vs. *General Elec. Co.*, 267 Fed. 564, 569, bottom.

ages are present therein and the application of a forced draft or current of air to those eggs". (*e. g.*, brief, p. 2, near bottom)[3].

It is sufficient to answer that *exactly that claim was asserted in the Patent Office* (claim 1 of amendment of Apr. 7, 1917; Vol. II, p. 346), and was rejected as anticipated (p. 350) and cancelled (p. 352):

> "1. The method of hatching eggs by arranging the eggs in various stages of incubation in a column, the eggs, in different stages of incubation being in diferent levels, and applying heated air driven at a predetermined speed about the eggs whereby the heated air will be adapted to eggs in various stages of incubation."

So, the identical assertion of invention now made as a matter of *interpretation* to support respondents' position, was advanced as a *claim* to the Patent Office, but was denied, followed by cancellation and the submission of a new claim, whose limitations dispose of infringement, as shown at pages 8-9 and 24-25 of our main brief; and the authorities at pages 16-17 thereof control.

IV.

Elements of the claim must be given the same definition as in specification.

At page 41, respondents argue that petitioner is seeking to read into the claim an element not stated there, because it is described in the specification. Counsel are mistaken. As shown at page 8 of our main brief, we use the specification's definition of the word "arranging" as applying to the same word in the claim, and that is justified by every canon of interpretation, both of the law of contracts and of patent law.

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[3] See also respondents' brief, p. 7, near bottom; p. 20, middle; p. 43, bottom; p. 44, middle.

Our adversaries' citation of the decision in *McCarthy* vs. *Lehigh Valley Co.*, 160 U. S. 110, 116, is inapposite, because that case simply held that details of mechanism not mentioned as elements in a claim could not be read into it in order to save it from anticipation, merely because they are described in the specification. That is aside from the point we make, which is not attacked.

V.

Comparison of Claims.

Respondents argue (brief, p. 19, bottom) to the effect that, because the Smith patent contains claims of more limited scope, claim 1 in issue should be construed without regard to the limitations for which we contend.

Our reply is two-fold:

a. Claims 2 and 3 are the only other method claims. Each of them contains the *same limiting phrases* upon which we rely, and *others besides* which are not applicable here. That is, the pregnant word "*arranging*" (discussed at page 8 of our main brief); the terms "restricted openings"; "*a* current of heated air" (our main brief, p. 9); "units of heat • • • carried from the eggs in *the* more advanced stage • • •" (*id.*); are all common to all three claims. So that the respondents' argument and the decisions it cites have no applicability to the situation here.

b. Even were there differences between broad and narrow claims in the critical respects which our adversaries postulate, another rule of law enters, where (as here) the narrow claims actually measure the patentee's achievement. The Court will then construe the more broadly expressed claims as of the same narrow scope as the others. See *Westinghouse Co.* vs. *Formica* Co., 266 U. S. 342, at page 354.

VI.

"A current of heated air."

Respondents merely play on words in asserting, as they do repeatedly[1], that defendant's circulation of air is "in current form", or that defendant uses "current movement". The claim was limited to "*a* current", after repeated efforts to obtain claims upon *every* form of forced circulation. As all the lower tribunals found, petitioner uses a plurality of currents flowing upwardly, downwardly, laterally left and right from two fans at the back wall. No amount of phrasing can conceal the undisputed facts, whose pertinency we argue in our main brief (*e. g.*, p. 24), but which our adversaries do not meet.

Conclusion.

It seems to us that respondents' major points lack stability.

On the whole case, we submit that petitioner's position has not been attacked successfully.

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[1] Respondents' brief, p. 4, 9th line; p. 9, bottom; p. 36, 6th line.